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NTSB Order No. EA-3487

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

SE-9645

v.

KAY WYNNETTE SCHUTTLER,

Respondent.

OPINION AND ORDER

The respondent and the Administrator have both appealed from the oral initial decision Administrative Law Judge Joyce Capps issued in this proceeding on July 14, 1989, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed in part an order of the Administrator suspending respondent's airline transport pilot ("ATP") certificate on allegations that she violated sections 121.548 and 121.581(b) of the Federal

¹An excerpt from the hearing transcript containing the initial decision is attached.

Aviation Regulations ("FAR"),² 14 C.F.R. Part 121³, by not giving free and uninterrupted access to the cockpit to an FAA inspector who had presented his credentials and who was performing the duties of conducting an en route inspection, and by not making available the forward observer's jumpseat, as selected by the inspector to conduct the inspection. The law judge further ruled that the sanction ordered by the Administrator, suspending respondent's ATP certificate for a period of thirty days, should be modified to fifteen days, and that it should be waived under the terms of the Aviation Safety Reporting Program ("ASRP") because of respondent's timely filing of a report of the incident with the National Aeronautics and

²The Administrator has not appealed that portion of the law judge's initial decision which found FAR §121.581(a) inapplicable to the facts presented herein.

³FAR §§121.548 and 121.581(b) provide as follows:

"§121.548 Aviation safety inspector's credentials: Admission to pilot's compartment.

Whenever, in performing the duties of conducting an inspection, an inspector of the Federal Aviation Administration presents form FAA 110A, "Aviation Safety Inspector's Credential," to the Pilot in command of an aircraft operated by an air carrier or commercial operator, the inspector must be given free and uninterrupted access to the pilot's compartment of that aircraft.

§121.581 Forward observer's seat: En route inspections....

(b) In each airplane that has more than one observer's seat, in addition to the seats required for the crew complement for which the airplane was certificated, the forward observer's seat or the observer's seat selected by the Administrator must be made available when complying with paragraph (a) of this section."

Space Administration ("NASA").

On appeal, respondent asserts that the law judge erred in affirming the order because the Administrator failed to establish the allegations of violations by a preponderance of the evidence.

Respondent also contends that the law judge erred in determining that the inspector's presence in the forward jumpseat did not impact upon the safe operation of the flight. Finally, respondent asserts that even if the violations are established, the law judge erred in finding any sanction appropriate. The Administrator asserts on appeal that the law judge incorrectly ruled that the sanction should be waived under the terms of the ASRP. Both parties have filed briefs in reply.

Upon consideration of the briefs of the parties and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge with regard to the FAR section 121.581(a) allegation, and as modified to provide for a suspension of respondent's ATP certificate for fifteen days. For the reasons that follow, we will deny respondent's appeal and grant the Administrator's appeal.

On August 31, 1987, respondent, a Captain for U.S. Air, was performing the pre-flight check list for a trip from Pittsburgh to LaGuardia Airport when an FAA inspector arrived in the cockpit in order to conduct an en route inspection. The inspector testified that he introduced himself, showed his FAA credentials,

and presented to respondent an authorization form which he had received from U.S. Air Flight Operations and which authorized him to ride in the jumpseat.⁴ According to the inspector, respondent indicated that she had a First Officer-in-training who was also scheduled to ride in the forward jumpseat for training purposes, but that the inspector could ride in the second, or aft, jumpseat. The inspector indicated that this would not be satisfactory. Respondent contacted her Director of Flight Operations, who told her that he understood that the FAA's Principal Operations Inspector ("POI") had agreed with U.S. Air that, in such an event, the inspector would agree to take the aft jumpseat. Both the Director of Flight Operations and respondent informed the inspector of this agreement, but he replied that even if such an agreement existed, it would be contrary to the Federal Aviation Regulations. He insisted that he be permitted to fly in the forward jumpseat.⁵ Respondent called her Director

⁴The inspector, who had just had an altercation with respondent's husband, also a U.S. Air captain, before boarding the aircraft, placed the green authorization form down on the captain's pedestal. Respondent claims that he "slapped" the form down and that he raised his voice. Even if the inspector's manner was abrasive, we cannot accept respondent's claim that it made her fear for her safety and the safety of her crew, and that it was a reason why she insisted that the inspector sit farther away from her, in the aft jumpseat. As we noted in Administrator v. Thorn, NTSB Order No. EA-2973 at 6 (1989), where a pilot was confronted with an inspector who did not like him, "[i]f respondent believed that the inspector's presence impaired his ability to fly safely, then respondent had the duty of leaving the flight."

⁵The inspector testified that he could not properly perform an en route inspection from the aft jumpseat.

of Flight Operations again, and he testified that he told her she should, in effect, "do what she had to do." He also warned her that "she knew the rules" and that she would have to accept the consequences of her actions. Respondent returned to the cockpit and demanded to know what section of the FAR required that she allow the inspector to sit in the forward jumpseat. The inspector replied "FAR Part 121," but he could not cite a specific regulation.⁶ Respondent again instructed the First Officer-in-training to take the forward jumpseat, after which the inspector asked the respondent if she was denying him access to the cockpit. Respondent replied that she was not.⁷ The inspector then departed the aircraft.

Respondent contends that the Administrator failed to establish the allegations by a preponderance of the evidence because the Administrator failed to prove that the inspector

⁶Respondent asserts that the inspector's inability to specifically cite FAR section 121.581 should excuse her noncompliance with that regulation. We disagree. "Airmen must be held to a knowledge of the regulations." Administrator v. Hinkle, 3 NTSB 1044, 1045-1046 (1978).

⁷Respondent believes that she complied with the requirements of FAR §121.548 by offering the inspector the aft jumpseat. We disagree. An inspector is not given free and uninterrupted access to the cockpit unless he is able to take the observer's seat of his choice. See FAR §121.581(b), supra n.2.

intended to conduct a bona fide en route inspection.⁸ She asserts that it was her belief that the inspector was on personal travel and that she was therefore justified in denying him the forward jumpseat. We reject respondent's contention because it is premised on the erroneous belief that she is in a position to evaluate the FAA inspector's intentions. "[A]n inspector has only one purpose to ride in the cockpit - to perform an authorized inspection - and there is no reason to assume his purpose is to obtain free transportation." Administrator v. Brown, NTSB Order No. EA-2204 at 4 (1985), citing Administrator v. Glowka, 3 NTSB 2353, 2354 n.5 (1980). The fact that the en route inspection which gave rise to this complaint coincided with the inspector's travel between his permanent station and a temporary duty assignment is irrelevant to our determination.⁹ The Administrator established that aviation safety inspectors are encouraged to conduct en route inspections at every opportunity, while on official duty time. Indeed, the inspector's superior

⁸Respondent contends that a violation of Section 121.548 cannot be upheld since the inspector failed to present his credentials to her, as required by the regulation. While we agree that the presentation of credentials appears to be a condition precedent to a finding of a violation of FAR section 121.548, the law judge found as a matter of credibility that the inspector did present his credentials to respondent and we have no reason to disturb this finding. See e.g. Respondent's Exhibit R-1, the inspector's written statement made less than 2 weeks after the incident, where he states that he presented his credentials.

⁹Respondent claims that the inspector was "commuting" between Pittsburgh and New York.

testified that he, the superior, conducted an en route inspection while travelling from his assigned office to the hearing in this matter. Furthermore, the fact that the inspector did not observe the walk-around of the aircraft does not show that he did not intend to conduct an en route inspection.¹⁰ If respondent truly questioned the legitimacy of the inspection, her proper remedy was to make a complaint to the FAA upon landing, not to refuse the inspector full access to the cockpit.¹¹

We are also unpersuaded by respondent's claim that her good faith reliance on her Director of Operations' advice concerning his "gentleman's agreement" with the FAA's principal operations inspector ("POI")--that inspectors would defer to the company and use the aft jumpseat when the forward jumpseat was needed for

¹⁰We reject respondent's claim that an aviation safety inspector must perform every function listed in the inspector's handbook in order to "properly" perform an en route inspection. See Administrator's Exhibit A-1, an excerpt from the aviation inspector's handbook, which directs that a "properly conducted en route inspection may directly or indirectly evaluate any or all" of a list of items. We believe that the Administrator intended to give FAA inspectors the discretion to determine which items should be evaluated in any given inspection. We also think that an en route inspection conducted by an operations inspector may differ significantly from an inspection performed, as here, by an airworthiness inspector, because of their different areas of expertise.

¹¹Respondent cites to dicta in Administrator v. Sullivan, 3 NTSB 1292 (1978) appearing to authorize a pilot to refuse an inspector entry into a cockpit once he has confirmed a belief that the inspector is only interested in a "free ride." Whatever value this case may have as precedent, it is inapposite here since we do not find that respondent confirmed any suspicion she may have had that this was not a bona fide inspection, before refusing access to the inspector.

observers--should excuse any violation or mitigate against a sanction, citing Administrator v. Kellogg, 1 NTSB 1254 (1971) and Administrator v. Schmid, 1 NTSB 1645 (1972). Respondent's reliance on Kellogg and Schmid is misplaced. In Kellogg there was an FAA-approved company manual provision which the Board found Kellogg could reasonably interpret as requiring the second officer to perform certain duties from the center jumpseat to the exclusion of an FAA inspector who was performing an en route inspection, notwithstanding the provisions of section 121.548. The Board found no violation because of the conflicting manual provision, noting also that the pilot's motivation was safety and that in any event, the manual provision had since been changed. In Schmid there was no manual provision requiring the second officer to perform duties from the center jumpseat, but Schmid was unaware of the change. Since Schmid could not claim a valid justification for excluding the inspector from the center jumpseat as in Kellogg, the Board found that the violation should be affirmed but that a sanction was unnecessary, particularly because the Board found that "all concerned" were now aware of the changed manual provision, and that problems of this kind would no longer occur, thereby making a sanction unnecessary for deterrence purposes.

Turning to the Administrator's appeal, the law judge focused in the initial decision on whether respondent's actions were "inadvertent and not deliberate" so as to come within the terms

of the ASRP. We agree with the Administrator that this analysis is inconsistent with our decision in Administrator v. Crim, 3 NTSB 2471 (1980), where we held that denial of access to the cockpit is conduct which does not fall within the parameters of the ASRP.¹² Since the Administrator has not appealed the law judge's ruling that a 15-day sanction is more consistent with Board precedent than the 30-day sanction ordered in his complaint, see e.g., Administrator v. Gellert, NTSB Order No. EA-2506, recon. denied EA-2546 (1987)(20 days); Administrator v. Brown, NTSB Order No. EA-2204 (1985)(20 days); Administrator v. Thorn, NTSB Order No. EA-2973 (1989)(15 days); Administrator v. Crim, 3 NTSB 2471 (1980)(15 days); and Administrator v. Glowka, 3 NTSB 2471 (1980)(15 days), we will affirm a 15-day suspension of respondent's ATP certificate.

¹²Respondent cites Administrator v. Patrizzi, NTSB Order No. EA-2877 (1989), Administrator v. Curry, NTSB Order No. EA-2294 (1986), and Administrator v. Heil, NTSB Order No. EA-2359 (1986) as cases where the Board has held that conduct which occurred before flight could fall within the ambit of the ASRP. We have reviewed these cases and we find that this issue was not directly before the Board, nor does it appear that it was briefed by the parties in those cases. Thus, in our view, respondent has offered us no persuasive reason why Crim should not be controlling here.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The Administrator's appeal is granted; and
3. The Administrator's order, as modified by the law judge with respect to the section 121.581(a) violation and with respect to the period of the suspension, and the initial decision, except that part which waived the sanction under the terms of the ASRP, are affirmed.
4. The 15-day suspension of respondent's ATP certificate shall commence 30 days after service of this order.¹³

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹³For purposes of this order, respondent must physically surrender her certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).